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Ong Soo Kan (beneficiary of the estate of Loh Ah Moy@ Loh Siew Keng, deceased) & Ors v Ong Soo Kwee (as executor and trustee of the estate of Loh Ah Moy @ Loh Siew Keng, deceased) & Anor

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCvC-542–08 OF 2021

C MOHD JOHAN LEE JC

13 MARCH 2023

Succession — Probate — Revocation of grant — Application by beneficiaries for revocation of grant of probate and removal of executor and co-trustee of estate — Beneficiaries filed application under O 14A of Rules of Court 2012 for determination of legal questions — Whether executor and co-trustee of estate breached fiduciary duties when filing legal action against another executor and trustee of estate — Whether there was conflict of interest — Whether breach of fiduciary duties amounted to 'sufficient cause' under s 34 of Probate and Administration Act 1959 for revocation of grant of probate — Whether executor and co-trustee ought to be removed — Probate and Administration Act 1959 s 34 — Rules of Court 2012 O 14A

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The parties in the present case were the beneficiaries of the estate of the deceased. The first defendant was also the executor and the co-trustee of the estate of the deceased. In cll 8 and 9 of the deceased's will, it was mentioned that all real and movable properties, investments, and monies should only be distributed 20 years from the time of the death of the deceased or the death of the first defendant, whichever earlier. However, after the 20 years period expired, the first defendant had filed originating summons ('Suit 673') seeking an order for the distribution of the assets which was related to the will to his possession ('the assets'). Disgruntled with the first defendant's action, the plaintiffs filed the present application pursuant to O 14A of the Rules of Court 2012 ('the ROC') ('the application'), whereby the plaintiffs sought to determine the following legal questions and to dispose of this case summarily: (a) whether the first defendant had breached his fiduciary duties as an executor and co-trustee of the estate of the deceased when the first defendant initiated Suit 673 against Ong Soo Keok (as the executor and trustee of the estate) and against Oh Ghee Soon (as the trustee of the estate) ('the first question') — in respect of this question, the plaintiffs submitted that the first defendant had put himself in a possible conflict between his personal interest and the interest of the beneficiaries whereas the first defendant submitted that in the *ex tempore* order of the Court of Appeal in 2012 ('the 2012 order'), the court held that

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there was no conflict of interest; and (b) whether a breach of fiduciary duties by the defendant amounted to sufficient cause under s 34 of the Probate and Administration Act 1959 ('the Act') for the revocation of the grant of probate dated 28 November 2001 issued on 11 December 2001 ('the grant of probate'). If both questions were answered in the affirmative, the plaintiffs sought the court's orders for the revocation of the grant of probate, removal of the first defendant as the executor and co-trustee of the estate, and consequential reliefs.

Held, allowing the application:

(1) Application under O 14A of the ROC allowed for cases to be heard and finalised expeditiously without the need for a trial. By virtue of this provision, the court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings. Hence, the costs and expenses incurred on the case would be reduced and it could save lots of judicial times. In the present case, the court found that the questions posed by the plaintiffs were questions of law which were sufficient to determine the conclusion of the whole case. There was also no fact in dispute (see paras 16 & 19).

(2) There was nothing in the 2012 order to suggest that there was no conflict of interest when the first defendant filed Suit 673. Firstly, such order was issued in 2012 when Suit 673 had not been filed and secondly, the 2012 order was focusing on the executor-beneficiary relationship whereas the present action was concerning the first defendant's personal claim against the estate over the ownership of the assets notwithstanding his position as an executor of the estate (see para 20).

(3) The court found that there was a clear conflict of interest of the first defendant in initiating his claim in Suit 673. Since the first defendant was also the co-executor of the estate, the filing of Suit 673 had put him in an awkward position. His co-executor had since passed on and he was the only executor left. Under this tricky position, for the purpose of Suit 673, he had to give affidavit, testimony, or statements, for and against the estate. On one hand he had to defend the estate, on the other hand he had to pursue his claim against the estate. The court therefore answered the first question in the affirmative (see paras 26 & 31).

(4) Based on s 34 of the Act, the court may revoke the probate once the applicant had proved that there was indeed sufficient cause to do so. The burden of proof in determining whether there was a 'sufficient cause' lay on the applicant ie, in the present case, the plaintiffs. In the case of *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177, conflict of interest was listed as one of the situations of 'sufficient cause' by the court. As for the present case, the court was satisfied that the first defendant's action in filing Suit 673 was indeed a conflict of interest, and such conflict of

interest was sufficient cause for the court to revoke the probate pursuant to s 34 of the Act. Therefore, the second question was answered in the affirmative (see paras 34–35 & 42).

(5) The court could not grant the plaintiffs' application to appoint a new executor to replace the first defendant because the appointment of an executor was solely based on the will of the deceased. In the present case, there were two executors named in the will, ie, the first defendant and the late Ong Soo Keok. By the order of the court to remove the first defendant from the executorship of the estate, supposedly, Ong Soo Keok would automatically be the sole executor. However, Ong Soo Keok had since passed away. The chain of executorship had ended with the removal of the first defendant as the executor. At this juncture, the court could only appoint, as prayed by the plaintiffs, an additional co-trustee for the estate, but not the executor (see paras 44 & 46).

(6) It was of utmost importance for the parties to differentiate the law and procedure for the grant of probate and for the letter of administration. The court could not simply order any consequential relief and disregard the procedure. Before the application was filed, the plaintiffs had made several applications to amend their statement of claim and these applications were all granted by the court. Yet they had never applied to insert this relief seeking to issue a new letter of administration and to appoint an administrator or follow the proper procedure for the issuance of the same thereto. This was something that the court could not order merely as consequential relief (see para 52).

[Bahasa Malaysia summary

Pihak-pihak dalam kes ini adalah penerima-penerima harta pusaka si mati. Defendan pertama juga merupakan wasi dan pemegang amanah bersama harta pusaka si mati. Dalam klausa 8 dan 9 wasiat si mati, disebutkan bahawa semua harta tak alih dan harta alih, pelaburan, dan wang hanya perlu diagihkan 20 tahun dari masa kematian si mati atau kematian defendan pertama, yang mana lebih awal. Walau bagaimanapun, selepas tempoh 20 tahun tersebut tamat, defendan pertama telah memfailkan saman pemula ('Saman 673') untuk mendapatkan perintah untuk pengagihan aset yang berkaitan dengan wasiat tersebut kepada pemilikannya ('aset tersebut'). Tidak berpuas hati dengan tindakan defendan pertama, plaintif-plaintif memfailkan permohonan ini menurut A 14A Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') ('permohonan ini'), di mana plaintif-plaintif memohon perintah mahkamah untuk menentukan soalan undang-undang berikut dan untuk melupuskan kes ini secara terus: (a) sama ada defendan pertama telah melanggar kewajipan fidusiarinya sebagai wasi dan pemegang amanah bersama harta pusaka si mati apabila defendan pertama memulakan Saman 673 terhadap Ong Soo Keok (sebagai wasi dan pemegang amanah harta pusaka) dan terhadap Oh Ghee Soon (sebagai pemegang amanah harta pusaka) ('soalan pertama') —

berkenaan dengan soalan ini, plaintif-plaintif berhujah bahawa defendan pertama telah meletakkan dirinya dalam kemungkinan konflik antara kepentingan peribadinya dan kepentingan pihak benefisiari manakala defendan pertama berhujah bahawa dalam perintah *ex tempore* Mahkamah Rayuan pada tahun 2012 ('perintah 2012'), mahkamah memutuskan bahawa tiada konflik kepentingan; dan (b) sama ada pelanggaran kewajipan fidusiari oleh defendan terjumlah kepada sebab yang mencukupi di bawah s 34 Akta Probet dan Pentadbiran 1959 ('Akta tersebut') untuk pembatalan Pemberian Probet bertarikh 28 November 2001 yang dikeluarkan pada 11 Disember 2001 ('pemberian probet tersebut'). Jika kedua-dua soalan dijawab secara afirmatif, plaintif memohon perintah mahkamah untuk pembatalan pemberian probet, penyingkiran defendan pertama sebagai wasi dan pemegang amanah bersama harta pusaka, dan relif-relif berbangkit.

Diputuskan, membenarkan permohonan:

(1) Permohonan di bawah A 14A KKM 2012 membenarkan kes didengar dan dimuktamadkan dengan segera tanpa memerlukan perbicaraan. Berdasarkan peruntukan ini, mahkamah boleh, atas permohonan pihak atau usulnya sendiri, menentukan apa-apa persoalan undang-undang atau pentafsiran apa-apa dokumen yang berbangkit dalam apa-apa kausa atau perkara pada mana-mana peringkat prosiding. Oleh itu, kos dan perbelanjaan yang ditanggung untuk sesuatu kes akan dikurangkan dan ia boleh menjimatkan banyak masa kehakiman. Dalam kes ini, mahkamah mendapati bahawa soalan-soalan yang dikemukakan oleh plaintif-plaintif adalah soalan-soalan undang-undang yang mencukupi untuk menentukan kesimpulan keseluruhan kes. Malahan, tiada fakta yang dipertikaikan (lihat perenggan 16 & 19).

(2) Tiada apa-apa dalam perintah 2012 tersebut yang menunjukkan bahawa tiada konflik kepentingan apabila defendan pertama memfailkan Saman 673. Pertama, perintah tersebut dikeluarkan pada 2012 semasa Saman 673 belum lagi difailkan dan kedua, perintah 2012 tersebut memfokuskan kepada hubungan wasi-benefisiari manakala tindakan semasa adalah berkenaan tuntutan peribadi defendan pertama terhadap harta pusaka tersebut berhubung dengan pemilikan aset tersebut tanpa mengira kedudukannya sebagai wasi harta pusaka tersebut (lihat perenggan 20).

(3) Mahkamah mendapati bahawa terdapat konflik kepentingan yang jelas terhadap defendan pertama dalam memulakan tuntutannya dalam Saman 673. Memandangkan defendan pertama juga merupakan wasi bersama harta pusaka tersebut, pemfailan Saman 673 telah meletakkan dia dalam kedudukan yang janggal. Wasi bersamanya telah meninggal dunia dan dia adalah satu-satunya wasi yang tinggal. Di bawah kedudukan rumit ini, untuk tujuan Saman 673, dia perlu memberikan

afidavit, keterangan atau kenyataan, bagi pihak harta pusaka tersebut dan juga menentang harta pusaka tersebut. Di satu pihak dia terpaksa mempertahankan harta pusaka tersebut, dan di pihak yang lain dia terpaksa meneruskan tuntutannya terhadap harta pusaka tersebut. Oleh itu mahkamah menjawab soalan pertama secara afirmatif (lihat perenggan 26 & 31).

(4) Berdasarkan s 34 Akta tersebut, mahkamah boleh membatalkan probet apabila pemohon telah membuktikan bahawa memang ada sebab yang mencukupi untuk berbuat demikian. Beban pembuktian dalam menentukan sama ada terdapat 'sebab yang mencukupi' terletak pada pemohon iaitu, dalam kes ini, plaintif-plaintif. Dalam kes *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177, konflik kepentingan telah disenaraikan sebagai salah satu situasi 'sebab yang mencukupi' oleh mahkamah. Bagi kes ini, mahkamah berpuas hati bahawa tindakan defendan pertama dalam memfailkan Saman 673 sememangnya merupakan konflik kepentingan, dan konflik kepentingan tersebut adalah sebab yang mencukupi untuk mahkamah membatalkan probet tersebut menurut s 34 Akta tersebut. Oleh itu, soalan kedua telah dijawab secara afirmatif (lihat perenggan 34–35 & 42).

(5) Mahkamah tidak boleh membenarkan permohonan plaintif-plaintif untuk melantik wasi baharu bagi menggantikan defendan pertama kerana pelantikan wasi adalah semata-mata berdasarkan wasiat si mati. Dalam kes ini, terdapat dua wasi yang dinamakan dalam wasiat tersebut, iaitu defendan pertama dan mendiang Ong Soo Keok. Dengan perintah mahkamah untuk mengeluarkan defendan pertama daripada wasi harta pusaka tersebut, sepatutnya, Ong Soo Keok secara automatik akan menjadi wasi tunggal. Bagaimanapun, Ong Soo Keok telah meninggal dunia. Rantaian penjawatan wasi telah berakhir dengan penyingkiran defendan pertama sebagai wasi. Pada ketika ini, mahkamah hanya boleh melantik, seperti yang dipohon oleh plaintif-plaintif, pemegang amanah tambahan untuk harta pusaka tersebut, tetapi bukan wasi (lihat perenggan 44 & 46).

(6) Adalah amat penting bagi pihak-pihak untuk membezakan undang-undang dan prosedur untuk pemberian probet dan untuk surat kuasa mentadbir. Mahkamah tidak boleh hanya memerintahkan apa-apa relif berbangkit dan mengabaikan prosedur. Sebelum permohonan difailkan, plaintif-plaintif telah membuat beberapa permohonan untuk meminda pernyataan tuntutan mereka dan semua permohonan ini telah diluluskan oleh mahkamah. Namun mereka tidak pernah memohon untuk memasukkan relif ini iaitu untuk pemberian surat kuasa mentadbir baharu dan melantik pentadbir atau mengikut prosedur yang sepatutnya untuk pemberian surat tersebut kepada mereka. Ini adalah

sesuatu yang mahkamah tidak boleh perintahkan hanya sebagai relif berbangkit (lihat perenggan 52).]

Cases referred to

Attorney General v Blake (Jonathan Cape Ltd third party) [2001] 1 AC 268, HL (refd)
Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors [2008] 4 MLJ 448, HC (refd)
Datuk Kim Kok Khin @ Kim Kok Khen v Tan Ah Tong [2014] 6 MLJ 747, CA (refd)
Deloitte & Touche AG v Johnson [2000] 1 BCLC 485, PC (refd)
Fleming v Fleming 2006 NLTD 112, SC (refd)
Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam [2010] 4 MLJ 842, HC (refd)
Heath v Heath [2018] EWHC 779 (Ch) (refd)
Jigarlal Kantilal Doshi v Amanah Raya Bhd (administrator of the estate of Kantilal Prabhulal Doshi, deceased) [2018] supp MLJ 211; [2011] 9 CLJ 361, FC (distd)
Khoo Boo Gong, decd Khoo Teng Seong, Re v Teoh Chooi Ghim & Ors [1981] 2 MLJ 68, FC (refd)
Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani) v Moti Harkishindas Bhojwani [2019] 3 SLR 356, HC (refd)
Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177; [2002] 6 CLJ 152, HC (folld)
Ong Eng Hock & Anor v Ong Cheng Guan & Anor [2018] 5 MLJ 701, FC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)
Rachel Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as the executor for the estate of Ong Soon Hoe, deceased) [1998] 6 MLJ 258, HC (distd)
RM P RM P V Palaniyappan v NPL ST MV Ramanathan Chettiar [1977] 2 MLJ 34 (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [2010] 1 MLJ 547, HC (refd)
Tan Kah Fatt & Anor v Tan Ying and another appeal [2021] MLJU 284, CA (refd)
Thomson, Re Thomson v Allen [1930] 1 Ch 203, Ch D (refd)

Legislation referred to

Probate and Administration Act 1959 ss 12, 34
Public Trust Corporation Act 1995
Rules of Court 2012 O 14A
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 71 r 37

Ranjit Singh (with Elizabeth Lau and Hazel Siau) (Elizabeth Lau) for the plaintiffs.

Jerry Ling (Lee, Ling & Partners) for the first defendant.
Daniel Albert (with Nicholas Yap) (Daniel & Wong) for the second defendant.

Mohd Johan Lee JC:

INTRODUCTION

[1] This is the plaintiffs' application ('the application') pursuant to O 14A of the Rules of Court 2012, whereby the plaintiffs are seeking to determine the following legal questions ('the questions') and dispose of this case ('this action') summarily:

> Question 1:
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> Whether the first Defendant (previously the Defendant) has breached his fiduciary duties as an executor and co-trustee of the estate of Loh Ah Moy @ Loh Siew Keng ('the Estate') when the first Defendant initiated legal proceedings vide Kuala Lumpur High Court Originating Summons No. WA-24NCvC-673-04/2021 ('Suit 673') against Ong Soo Keok (as executor and trustee of the Estate) and against Oh Ghee Soon (as trustee of the Estate)?
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> Question 2:
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> Whether a breach of fiduciary duties by the Defendant amounts to sufficient cause under section 34 of the Probate and Administration Act 1959 for the revocation of the Grant of Probate dated 28 November 2001 issued on 11 December 2001?

FACTS

[2] On 25 March 2001, Loh Ah Moy @ Loh Siew Keng passed away ('the deceased') and left a will ('the will'). In the will, it was mentioned that two of the deceased's sons were appointed as executors and trustees of the will, ie, the first defendant and the late Ong Soo Keok. A grant of probate was issued on 11 December 2001.

[3] The beneficiaries of the deceased were the first until the fifth plaintiffs, the first defendant and Ong Soo Keok. Essentially, it was understood that any real and movable properties, investments, and monies were to be distributed equally amongst the beneficiary. This is eluded in cl 2 of the will:

> Except for paragraph five (5) hereof I GIVE DEVISE and BEQUEATH all my real and movable properties, investments and monies wherever situated of one (1) share each to each of my four sons, Ong Soo Kan, Ong Soo Keok, Ong Soo Kit, Ong Soo Kwee and one (1) share to my late daughter, Ong Paik Joo's (deceased) three sons Peter Khong, Paul Khong and Khong Kok Yau in equal shares.

[4] Consequently, the issues that arise in the current case are related to cll 8 and 9 of the will. Clauses 8 and 9 of the will says:

Clause 8:

The rental income from my properties, dividend and returns from my investments shall be distributed every quarterly as follows:

Names	Shares
Ong Soo Kwee	2/6
Ong Soo Kan	1/6
Ong Soo Keok	1/6
Ong Soo Kit	1/6
Peter Khong	1/18
Paul Khong	1/8
Khong Kok Yau	1/8

Clause 9:

I direct that the said arrangement under paragraph eight (8) shall continue for the next twenty (20) years from the time of any death or until the death of my son Ong Soo Kwee, whichever is earlier my said Executors and Trustee shall then distribute my real and movable properties, investments and monies in the proportions is stated in paragraph two (2) and three (3) as stipulated aforesaid.

[5] Following cll 8 and 9 above, all real and movable properties, investments and monies should only be distributed 20 years from the time of the death of the deceased or the death of the first plaintiff, whichever is earlier. The 20 years period expired on 25 March 2021.

[6] However, on 5 April 2021, the first defendant filed Suit 673 by way of originating summons (later converted to a writ) against Ong Soo Keok and Ong Ghee Soon (the trustees of the estate). In Suit 673, the first defendant sought that the following be distributed to his possession:

(i) Peti Simpanan No C416 (HSBC Bank Malaysia Berhad) & Peti Simpanan No. 3339 dan 4527 (HSBC Bank Malaysia Berhad) dan kemudian itu untuk disimpang di Public Bank Berhad (Menara PBB, Jalan Ampang) (Semua dalam Nama Bersama di antara Loh Ah Moy dan Ong Soo Kwee)

Semua hartabenda peribadi ('personal chattels') kepunyaan Loh Ah Moy @ Loh Siew Keng, simati dialih kepada Plaintif secara orang yang masih hidup ('survivorship') untuk Peti-Peti Simpanan Bersama tersebut.

(ii) Peti Simpanan No. 225 (Citibank Berhad) (dulu di OCBC Bank Malaysia Berhad dalam Peti Simpanan Bersama No. 987LA dengan Ong Soo Kan)

Semua hartabenda peribadi ('personal chattels') kepunyaan Loh Ah Moy @ Loh Siew Keng, simati secara wasiat spesifik kepada plaintiff seperti yang dinyatakan dalam Nota 'Everything in this box belongs to Soo Kwee dated 29.12.1989. Signed Loh Ah Moy'.

(iii) Peti Simpanan No. 224 (Citibank Berhad) dulu di OCBC Bank Malaysia

Berhad dalam Peti Simpanan No. K1283B dalam nama tunggal Loh Ahh Moy)

Semua hartabenda peribadi ('personal chattels') kepunyaan Loh Ah Moy@ Loh Siew Keng, simati:

(a) Atas wasiat spesifik kepada Plaintif seperti yang dinyatakn dalam Nota 'Everything in this box belongs to Soo Kwee dated 29.12.1989. Signed Loh Ah Moy.

(b) Alternatifnya, atas Perintah Tindakan 2005 bertartikh 9.2.2007 dan Perintah Tindakan 2011 bertarikh 13.02.2012.

(collectively, 'the assets')

[7] Dissatisfied with the first defendant, the plaintiffs initiated this action against the first defendant. By an order of this court, the second defendant was later added into this action as a co-defendant. The plaintiffs then filed the application. In the application the plaintiffs sought that In the event the answers to question 1 and question 2 are in the affirmative, this court shall make the following orders:

(a) an order that the grant of probate dated 28 November 2001 issued by the Kuala Lumpur High Court on 11 December 2001 vide Petition No S3–32–535 of 2001 be revoked;

(b) an order that Ong Soo Kwee be removed forthwith as an executor and co-trustee of the estate; and

(c) consequential reliefs.

THE PLAINTIFFS' CASE

[8] In respect to the first question, the plaintiffs submitted that the first defendant had breached his fiduciary duty as an executor of the will when he put himself in a possible conflict between his personal interest and the interest of the beneficiaries. The plaintiffs argued that it was clear from the will that all of the deceased's real and movable properties, investments and monies shall be distributed amongst the beneficiaries after the lapse of 20 years.

[9] In continuation, the plaintiffs further premised that the first defendant knew that the assets were also part of the estate which must be distributed and/or divided amongst the beneficiaries.

[10] On the second question, the plaintiffs contended that 'possible conflict of interest' as pleaded by the plaintiffs constituted 'any sufficient cause' under s 34 of the Probate and Administration Act 1959. To this, the plaintiffs had quoted several cases to support their contention.

[11] The application and the submission of the plaintiffs were duly supported by the second defendant. The counsel for the second defendant had also added some additional cases to further support the application.

THE FIRST DEFENDANT'S CASE

[12] On the other hand, to refute the application, the first defendant argued that the first question was premature. The first defendant grounded his claim by submitting that for this court to determine whether there was a conflict of interest, this court need to see amongst others whether,:

(a) the first defendant has a valid claim in Suit 673;

(b) the first defendant owes fiduciary duties and/or obligation to the plaintiffs in respect to the assets; and

(c) the Court of Appeal *ex tempore* judgment that there was no conflict of interest by the first defendant just because the first defendant was an executor and beneficiary of the deceased's estate would estop this action.

[13] Secondly, the first defendant also contended that his claim in Suit 673 is based on the law of gifts, not probate and administration. This is because, there were notes in the safe box deposits stating that 'Everything in this box belongs to Soo Kwee dated 29.12.1989. Signed Loh Ah Moy'. Moreover, the plaintiffs also cannot debunk that the purported notes were forged or fraudulently made by the first defendant.

[14] Thirdly, the first defendant premised that the filing of Suit 673 does not amounted to breach of fiduciary obligation. Even if such conflict of interests could be considered as a sufficient cause, this court would still need to determine whether the first defendant has fiduciary duties to the beneficiaries concerning the assets.

FINDINGS AND DECISION OF THIS COURT

[15] After appraising the facts adduced by both parties through affidavits and exhibits, and having considered the submissions by the learned counsels for both sides, I find that the application has merits. My decision is based on the following findings.

Principles of O 14A of the Rules of Court 2012

[16] Order 14A applications allow for cases to be heard and finalised expeditiously without the need for a trial. By virtue of this O 14A, the court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter

at any stage of the proceedings. Hence, the costs and expenses incurred on the case would be reduced and it could save lots of judicial times (see *Datuk Kim Kok Khin @ Kim Kok Khen v Tan Ah Tong* [2014] 6 MLJ 747).

[17] In *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, His Lordship Mohd Noor Ahmad JCA had laid down the principle on O 14A (at p 19, para [12]):

> [12] In a nutshell, the order *enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein*. The order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of O14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our O14A. In *Korso Finance Establishment Anstlat v John Wedge* (unreported, February 15 1994 (CA) Transcript No. 14/387), the English Court of Appeal laid down the following principles on the ambit of O 14A:
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> (1) *An issue is 'a dispute point of fact or law relied on by way of claim or defence'.*
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> (2) *A question of construction is well capable of constituting an issue.*
>
> (3) *If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.*
>
> (4) *Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might rum up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances, of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, in the absence of such evidence the court should not refrain from dealing with the application* (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/5). (Emphasis added.)

[18] Also in *Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors* [2008] 4 MLJ 448, Her Ladyship Rohana Yusof J (as she then was) observed that the court will, in O 14A application, determine the issues of law upon the construction of documents whenever it appears to the court that the determination of any question of law will lead to a final conclusion of the action because there are no facts in dispute.

[19] In our present case, I find that the questions posed by the plaintiffs in the application are questions of law which are sufficient to determine the conclusion of the whole case. There is also no fact in dispute. What is needed is to determine the correct interpretation and application of the laws

concerning the application through the answers to the questions mooted. I shall discuss the questions separately below.

Whether there is a breach of fiduciary duties

[20] To begin with, in resisting this action, the first defendant had argued that the Court of Appeal in granting the *ex tempore* order in 2012 ('the 2012 order') had also held that there was no conflict of interest. However, a detail reading of the 2012 order would clearly show that this is misplaced. Firstly, that order was issued in 2012 when Suit 673 had not been filed. The filing of Suit 673 in 2021 has now made the circumstance of this action distinctively different from all earlier cases. Besides, the 2012 order was focusing on the executor — beneficiary relationship where para 5.3(iii)(c) of the 2012 order (as pleaded by the first defendant in his defence) has stated that, 'any executor/beneficiary relationship is no reason to say that there was a conflict of interest'. This action, on the other hand, is concerning the first defendant's personal claim against the estate over the ownership of the asset notwithstanding his position as an executor of the estate. Therefore, there is nothing in the 2012 order to suggest that there is no conflict of interest when the first defendant filed Suit 673 against the estate. In answering the first question, this court must now determine whether there is indeed a breach of fiduciary duties and conflict of interest.

[21] For the first question, the plaintiffs submitted that since the first defendant was also the executor of the estate, his action in initiating Suit 673 created a possible conflict of interest. Since he is claiming the assets for himself in Suit 673, his personal interest and the interest of the beneficiaries would be in skirmish. To support, the plaintiffs cited the cases of *Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani) v Moti Harkishindas Bhojwani* [2019] 3 SLR 356 and *Re Thomson, Thomson v Allen* [1930] 1 Ch 203) to show that the first defendant ought to act in the best interest of the beneficiaries and not put himself in a position where his personal interest conflicts or would possibly conflict with the interest of the beneficiaries.

[22] The plaintiffs further argued that it was quite clear that the assets were indeed part of the estate because the assets were listed and included in the list of assets and liabilities of the deceased in the grant of probate dated 28 November 2001.

[23] Therefore, it was the plaintiffs' submission that such personal claim as initiated by the first defendant in Suit 673 had put him in a position of conflict of interest between his personal interest and the interest of the beneficiaries of the estate. Here, the plaintiffs also cited the cases of *Heath v Heath* [2018] EWHC 779 (Ch) and *Tan Kah Fatt & Anor v Tan Ying and another*

appeal [2021] MLJU 284.

[24] On the other hand, the first defendant argued that his personal claim in Suit 673 did not amount to any breach of fiduciary duties. Firstly, he submitted that he is within his right as one of the beneficiaries of the said estate to claim the assets. Secondly, the first defendant premised that the assets were a gift to him as stated in the purported note in the safe deposit boxes (to which the plaintiffs claimed otherwise).

[25] Moreover, in an Originating Summons No 25–24–2019 of 2005 ('OS 2005'), the court had already dismissed the beneficiaries' claims that the assets were residuary assets on trust. Mindfully, this action was not appealed by the plaintiffs. Thus, it is the first defendant's contention that the distribution of the assets to him is not based on probate and administration law but on the law of gifts. The first defendant based his claim in Suit 673 on the purported note. Hence, the fiduciary duties submitted by the plaintiffs is misplaced since fiduciary duties do not extend to gift.

[26] Taking into consideration the litigants' submission, I am agreeable with the plaintiffs. Firstly, it is obvious that from the moment the first defendant sued the estate there is a conflict of interest. This is because in doing so, the first defendant would wear two hats, ie, as the claimant against the estate, and the executor and trustee for the estate. He is essentially, testifying against and on behalf of the estate at the same time.

[27] Her Ladyship Nallini Pathmanathan JC (as she then was) in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547 quoted the following description of 'conflict of interest' by Lord Millett in *Deloitte & Touche AG v Johnson* [2000] 1 BCLC 485:

> ... Their Lordships observe that the expression 'conflict of interest' is an abbreviation for 'conflict of interest and duty'. The rule is that *a fiduciary may not without the informed consent of his principal place himself in a position where his interest may conflict with his duty to the principal. The danger is that his interest may affect him in the discharge of his duty to the prejudice of his principal.* (Emphasis added.)

[28] Likewise in *Attorney General v Blake (Jonathan Cape Ltd third party)* [2001] 1 AC 268 at p 280, the House of Lords explained that under the principle of 'breach of trust and fiduciary duty' the trustee and fiduciaries may not put themselves in a position where their duty and interest conflict. To this end they must not make any unauthorised profit. If they do, they are accountable. Whether the beneficiaries or persons to whom the fiduciary duty is owed suffered any loss by the impugned transaction is altogether irrelevant.

[29] The plaintiffs' counsel also quoted the English case of *Heath v Heath* [2018] EWHC 779 (Ch), where Carr J allowed the removal of one Timothy from his position as an executor on the basis that there was a possibility of conflict of interest. In that case, the court found that the claim by Timothy was against the estate. Carr J in delivering his judgment observed the followings:

> 13. The much more difficult problem is that Timothy has made it clear that his position is that, given that he provided for several years of care for his mother and his brothers did not, he is entitled to greater share of the estate than the 1971 will provides. He has explained that he wishes to contend that there is implied contract or possibly a *quantum meruit* claim based on the propositions that: he ought to be recompensed; that his services to his mother should be recognised; that his claim requires quantification; and that that it is a debt which the estate ought to pay. *That gives rises to a conflict of interest between his duties as executor and his potential claim as a claimant against the estate*. Furthermore, Timothy's position is that his mother recognised his greater contribution by making a second will which left 100% of the estate to him. If that is his position, then *I do not see that, as an executor, he can carry out the administration of will which gives equal shares to each of the beneficiaries*. (Emphasis added.)

[30] Similarly, in the recent case of *Tan Kah Fatt & Anor v Tan Ying and another appeal* [2021] MLJU 284 the Court of Appeal upheld the decision of the learned trial judge to remove Tan Kah Fatt as the co-administrator of the estate. Lau Bee Lan JCA in delivering the judgment of the court held that Tan Kah Fatt had acted in conflict of interest as an administrator. Lau Bee Lan JCA at para [67] premised that:

> ... On this note, we are of the considered view that the submission of counsel for Tan Kah Fatt that he had carried out his responsibility as an administrator in a proper, honest and diligent manner when he distributed the Insurance Monies whereby every beneficiary received RM1,497,000 and that the shares of the monies are kept for the interest of Tan Sin Lee and Tan Sin Yee (see para 7 above) are acts of Tan Kah Fatt which is negated when weighed against the fact that he had acted in conflict of interest of his duty as administrator; *on one hand he distributed the Insurance Monies but on the other hand, as a director of Y-Teq and YE Motorcycles (plaintiffs in Suit 2), he took the position that the Insurance Policy was purchased for the benefit of the 2 companies* and as the learned JC correctly found he had given the consent for the plaintiffs in Suit 2 to proceed against the estate of the deceased. (Emphasis added.)

[31] Based on all of the above, it is my finding that there is a clear conflict of interest of the first defendant in initiating his claim in Case No 673. Since the first defendant is also the co-executor of the estate, the filing of Suit 673 has, in itself, put him in an awkward position. His co-executor has since passed on and he is the only executor left. Under this tricky position, for the purpose of Suit 673, he has to give affidavit, testimony, or statements, for and against the estate. On one hand he has to defend the estate, on the other hand he has to

pursue his claim against the estate. How can this not tantamount to a conflict or potential conflict of interest? Hence, I answer the first question in the affirmative.

Whether a conflict of interest constitutes 'sufficient cause' under s 34 of the Probate and Administration Act 1959

[32] Section 34 of the Probate and Administration Act 1959 says:

> Any probate or letters of administration may be revoked for sufficient cause.

[33] The above provision gives the court the discretionary power to revoke or amend any probate and letter of administration, provided that there is sufficient cause for the court to do so. 'Sufficient cause' in this context, is an objective one (see *Guindarajoo a/l Vegadason v Satgunasingam a/l Balasingam* [2010] 4 MLJ 842).

[34] The burden of proof in determining whether there is a 'sufficient cause' lies on the applicant ie, in this case, the plaintiffs. In the Federal Court case of *Ong Eng Hock & Anor v Ong Cheng Guan & Anor* [2018] 5 MLJ 701 His Lordship Jeffry Tan FCJ held that the person who seeks revocation of the probate or letters of administration has the burden to prove sufficient cause. His Lordship in delivering the judgment at p 709 highlighted the decision by Abdul Hamid J in *RM P RM P V Palaniyappan v NPL ST MV Ramanathan Chettiar* [1977] 2 MLJ 34:

> Before I finally state my finding, it may be useful to refer to the law affecting application for revocation of probate. It is settled law that *the court may revoke any probate if it is satisfied that there is sufficient cause to do so* (s 34 of the Ordinance). *The onus*, I think, *is on the applicant to establish that there is sufficient cause of the revocation*. What constitutes sufficient cause would, to my mind, depend upon the circumstances of each particular case. (Emphasis added.)

[35] Hence, it is clear that the court may revoke the probate once the applicant has proved that there is indeed sufficient cause to do so.

[36] In the present case, it is the plaintiffs' submission that the welfare and interests of the beneficiaries of the estate are one of the key elements that the courts need to consider in determining 'sufficient cause'. If the welfare and interest of the beneficiaries are threatened, the courts need to interfere by revoking the probate or letters of administration. To support their contention, the plaintiffs quoted another Federal Court case of *Re Khoo Boo Gong, decd Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68 where it was held at p 69 that:

> The power to revoke a grant of probate or letters of administration is vested in the

> High Court by s 34 of the Probate & Administration Act, 1959 (Rev 1972) and can be exercised for 'any sufficient cause.' However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154, 'the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto, 'then *the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries*. In our view, *that is a strictly objective test*'. (Emphasis added.)

[37] In the present case, it is clear that there the first defendant is in a position of conflict of interest with his role as an executor of the estate when he filed Suit 673. The fact that he had chosen to initiate Suit 673 for his personal claim surely shows that it is against the estate. How could he perform his duty under cl 9 of the will? To this, I find guidance in *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177; [2002] 6 CLJ 152. In this case, the plaintiff had made an application to revoke the defendant's appointment as executor and trustee of the estate of the deceased. The plaintiff claimed that the defendant's involvement in the acts of transferring assets and shares of a company in which he is the director of the company, to himself and other selected beneficiaries constituted a 'sufficient cause' under s 34. His Lordship Abdul Hamid Embong J (as he then was) in his judgment observed that the test to determine a 'sufficient cause' is an objective test. This means that it is enough for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act to invoke the court's jurisdiction under s 34 of the Probate and Administration Act 1959.

[38] In our present case, the first defendant's counsel tried to argue that this issue cannot be decided at this juncture since the question whether the purported note is false is yet to be proven. However, it is my finding that the allegation of fraud with regards to the purported note is not an issue before me. It is the live issue in Suit 673.

[39] Nevertheless, as submitted by the plaintiffs, the first defendant by filing his personal claim towards the assets in which the assets is a part of the estate that he acts as the executor and trustee, has put himself in a conflict situation between his duty as an executor and his personal interest. Hence, regardless of whether the purported note is false or not, objectively the plaintiffs have successfully raised a reasonable suspicion for this court to allow the revocation of the grant of probate. As stated by His Lordship Abdul Hamid Embong J in *Ligar Fernandez* at p 183, para C-D:

> ... The allegations for consideration are thus, a question of facts to be determined by this court on an objective test. *It is immaterial therefore if the allegations are actually believed or not; so long as it can be objectively determine that they raised a reasonable suspicion*, then, the plaintiff would have succeeded ... (Emphasis added.)

[40] Counsel for the second defendant in supporting the plaintiff case has quoted a Canadian case. They premised that the fact of this case is almost similar to our present case and thus must be considered by this court. In *Fleming v Fleming* 2006 NLTD 112, Amy Fleming (the applicant) had initiated an action against Isabelle Mary Fleming (the respondent) to remove her as administratrix of the estate of Adrian Fleming (the deceased). The applicant was one of the deceased's children in a previous marriage. Prior to the deceased's demise, he held fishing licenses and operated a fishing enterprise. The deceased's fishing vessel crew consisted of himself, Keith Fleming (the deceased's brother) and one Adrian Kielly. After the deceased's passing, the enterprise was carried on by the respondent saying that it was on behalf of the estate. However, the applicant disagreed. At the same time, Keith Fleming as representative of the estate of Joseph Michael Fleming (the deceased's father) had commenced an action against the deceased's estate claiming that the fishing licence was only being held by the deceased in trust for all of the sons of Joseph Michael Fleming, including Keith. In Keith Fleming's action, the respondent claimed that she has the right to receive half of the value of the licence and associated enterprise since she allegedly had invested some of her own funds to keep the business going. In the end, the Supreme Court of Newfoundland and Labrador Trial Division allowed the applicant's claim to remove the respondent from continuing her duty as the administratrix of the deceased's estate.

[41] Derek Green CJTD in removing the respondent from her position observed that there was such conflict of interest arose on part of the respondent. He observed that at para [14] that:

> [14] ... *A conflict of interest occurs whenever the personal interest of the personal representative conflicts with the interests of others for whom he or she has a duty to act. Clearly, whenever a person who is entitled to a share in an estate is appointed an administrator of that estate, there is possibility that he or she will act improperly to favour himself or herself over other beneficiaries. Yet, the rules of court expressly contemplate that such persons may serve and, indeed have a right of priority to appointment, as administrator*. See, Rule 56.02. That fact alone, therefore, will often not be sufficient to constitute a conflict of interest justifying removal. Where, *however, the nature of the personal interest of the administrator is such that he or she will inevitably, or even will likely, be placed in a conflict situation with respect to specific decisions involving the administrator not maintaining an even hand between beneficiaries or place him or her in a difficult situation with respect to maintaining impartiality, that will be enough*. In *Re Walter W Shaw Co* [1922] 3 WWR 119, MacDonald J said at p 120 that 'The question is whether it would be difficult for the trustee to act impartially, not whether, in fact, it would or would not do so. (Emphasis added.)

[42] As mentioned earlier, conflict of interest was listed as one of the situations of 'sufficient cause' by the court in *Ligar Fernandez*. As far as I am concerned, the first defendant's action in filing Suit 673 in indeed a conflict of

interest and conflict of interest is a sufficient cause for the court to revoke the probate as demanded by s 34 of the Probate and Administration Act 1959. Thus, the second question is also answered in affirmative.

[43] Since both of these questions are answered in the affirmative, the application is allowed. There is no other issue left concerning this action. This court, thus, decide this action in favour of the plaintiff summarily. For the completeness of discussion, I shall now discuss briefly another issue concerning the relief sought by the plaintiffs.

CONSEQUENTIAL RELIEFS

[44] Essentially, the plaintiffs in the application had sought for a relief to appoint a new executor to replace the first defendant. With due respect, I cannot grant this relief. This is because the appointment of an executor is solely based on the will of the deceased. When a person names an executor in his/ her will, such executor, upon the demised of this person, would then apply for a grant of probate from the court to deal with the assets and liabilities of the deceased.

[45] If the deceased had named two executors in his will, the chain of representation may arise if one of the executors had passed away or in any way cannot attend to his duty as per s 12 of the Probate and Administration Act 1959:

> 12 Executor of executor represents original testator
>
> (1) An executor of a sole or last surviving executor of a testator is the executor of that testator:

[46] Likewise, in the present case, there were two executors named in the will, ie, the first defendant and the late Ong Soo Keok. By the order of this court to remove the first defendant from the executorship of the estate, supposedly, Ong Soo Keok would automatically be the sole executor. However, Ong Soo Keok had since passed away. The chain of executorship has ended with the removal of the first defendant as the executor. At this juncture, this court could only appoint, as prayed by the plaintiffs, an additional co-trustee for the estate, but not the executor. This court simply do not have any power to appoint an executor for the estate if he or she has never been named in the will.

[47] During the clarification session, the plaintiffs' counsel argued that this court may appoint an administrator to administer the estate under the prayer 'any further or other reliefs that the court thinks fit' although the same has never been specifically pleaded or prayed. To support, the plaintiffs' counsel cited the case of *Jigarlal Kantilal Doshi v Amanah Raya Bhd (administrator of the*

estate of Kantilal Prabhulal Doshi, deceased) [2018] supp MLJ 211; [2011] 9 CLJ 361 and *Rachel Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as the executor for the estate of Ong Soon Hoe, deceased)* [1998] 6 MLJ 258.

[48] Unfortunately, I do not find that these two cases applicable to our present case. The issue in *Jigarlal Kantilal Doshi* was whether the Amanah Raya Bhd ('ARB') could petition for grant of probate under the Public Trust Corporation Act 1995 when it was only appointed as an administrator. The Court of Appeal held that the grant of probate applied by ARB was actually a grant of letters of administration with a will annexed. However, the Federal Court overruled this and found that the application made by ARB was specifically for a grant of probate and not a grant of letters of administration with will be annexed.

[49] His Lordship Abdul Hamid Embong FCJ in delivering the judgement stressed that it is important to differentiate between an appointment of an administrator and a grant. In this case, the Court of Appeal on 4 June 1998 had appointed ARB as an administrator of the estate. Hence, the correct application was for a grant of administration and not a grant of probate. Thus, the Federal Court unanimously held that the grant of probate should be set aside and the matter be corrected pursuant to the procedures set out under O 71 r 37 of the Rules of the High Court 1980 (now ROC 2012).

[50] The plaintiffs in *Rachel Mei Ling Ong* had made an application to remove the defendant as the executor/trustee of the deceased's estate for the defendant's lack of diligence in acting his duties as the executor/trustee of the estate. The plaintiffs submitted that the defendant had bluntly ignored the plaintiffs wishes and refused to give the plaintiffs relevant information pertaining to the deceased's estate. His Lordship Kamalanathan Ratnam JC (as he then was) allowed the plaintiffs' relief and consequently removed the defendant from being the executor/trustee of the estate. His Lordship in delivering his judgment observed that it was clear from the deceased's will that the trust ceased upon both of the deceased's children attaining the age of majority. Therefore, since the first and second plaintiffs had already reached the ages of 29 and 25 respectively, they were allowed to hold the properties in their personal capacities without the defendant interference.

[51] The plaintiffs' counsel argued that based on *Jigarlal Kantilal Doshi* and *Rachel Mei Ling Ong*, the appointment of administrator(s) is often granted following the removal of the executor and revocation of a grant of probate. With due respect, I disagree. Nothing in *Jigarlal Kantilal Doshi* could indicate that courts are allowed to make any appointment for administrator without the proper application of a letter of administration when a grant of probate was revoked. The Federal Court has explicitly stated that ARB should have

corrected its application pursuant to the procedures set out under O 71 r 37. The fact that this is a Federal Court decision clearly shows that this court is unable to ignore the procedure and requirements for the issuance of the letter of administrator and to order such relief. Likewise, there is nothing in *Rachel Mei Ling Ong* to suggest this. In fact, considering the different issues between this case and our present case, it is safe to say that *Rachel Mei Ling Ong* decision is not relevant to our present case.

[52] It is of utmost importance for the parties to differentiate the law and procedure for the grant of probate and for the letter of administration. This court cannot simply order any consequential relief and disregard the procedure. Before the application was filed, the plaintiffs had made several applications to amend their statement of claim before the application. These were all granted by this court. Yet they had never applied to insert this relief seeking to issue a new letter of administration and to appoint an administrator or follow the proper procedure for the issuance of the same thereto. This is something that this court could not order merely as consequential relief. Nevertheless, after proper explanation about the position of this court, the plaintiffs conceded to this and agreed to file in an application for a letter of administration separately after this.

CONCLUSION

[53] In conclusion, the answer to questions 1 and 2 are both in the affirmative. To conclude, this court thus find that the application brought by the plaintiffs has merits. I agree with the plaintiffs' submissions that there is a conflict of interest and consequently this conflict of interest also constitutes a sufficient cause as per s 34 of the Probate and Administration Act 1959. For these reasons, judgment is hereby entered against the first defendant and this court order the following:

(a) the grant of probate dated 28 November 2001 is hereby revoked;

(b) the first defendant is removed forthwith as an executor and trustee of the estate;

(c) Ong Ghee Sai is to be appointed as a co-trustee of the estate; and

(d) costs for the action and the application is to be paid personally by the first defendant to the plaintiffs.

Application allowed.

Reported by Dzulqarnain Ab Fatar